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Supreme Court of the United States

OCTOBER TERM 1948

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TAZE HAMRICK GIBSON

Petitioner

v.

A. P. REYNOLDS, E. H. MELLOR, B. R. MCCLANAHAN, S. C. VINSONHALER, JOE K. MAHONY, EBENEZER L. COMPERE, and TROY W. LEWIS

Respondents

◆

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Taze Hamrick Gibson petitions this Court for a writ of certiorari and shows unto the Court as follows:

1. *Opinion of the court below.*

The opinion of the court below is reported at 172 F. 2d 95, and appears in the printed record. [48-58] [1]

[1] Figures appearing within brackets herein refer to pages of the printed transcript of record.

2. *Jurisdiction.*

Jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule 38 of the Revised Rules of the Supreme Court of the United States.

3. *Timeliness of this petition.*

The judgment of the court below was rendered on January 11, 1949. [58] Time for filing this petition for certiorari was extended by order of the Court to April 25, 1949.

4. *Statutes and Regulations involved.*

Title 8, Section 43, United States Code (Civil Rights Act of 1871, as amended (17 Stat. 13)) reads: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Title 8, Section 47, of the United States Code (Civil Rights Act of 1871, as amended (17 Stat. 13)) reads, in part: "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby

another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators."

Section 5 (d) of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. § 305 (d)) reads: "Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act."

Section 10 (a) (2) (50 U.S.C.A. App. § 310 (a) (2)) reads, in part: "Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (1) of this Act."

Section 622.44, Selective Service Regulations (32 C.F.R. Supp.) reads: "(a) In Class IV-D shall be placed any registrant who is a regular or duly ordained minister of religion or who is a student preparing for the ministry in a theo-

logical or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

"(b) A 'regular minister of religion' is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

"(c) A 'duly ordained minister of religion' is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties."

5. *Constitutional provisions involved.*

The Fifth Amendment to the United States Constitution guaranteeing due process of law in all federal proceedings is involved.

6. *Questions presented.*

(1) Did the petitioner allege a cause of action for damages caused by malicious, arbitrary and capricious denial of petitioner's claim for exemption from training and service, and for malicious prosecution, by members of the Selective Service System?

(2) Did the courts below commit error in holding that the rule of absolute personal privilege and immunity against claims for damages produced by malicious, arbitrary and capricious acts of Government officials extended to members of the Selective Service System?

Statement of Case

FORM OF ACTION

This civil action was begun by filing a complaint for damages alleged to have resulted from malicious prosecution caused by the arbitrary and capricious action on the part of the appellees. It was brought by the appellant to redress the deprivation of his rights under the Civil Rights Act and the Selective Training and Service Act of 1940, as amended. [3-13]

The appellees filed separate motions to dismiss. [15-16] In each motion it was alleged that the complaint should be dismissed because it failed to state a cause of action and because the cause of action, if any, was barred by the statute of limitations. [15-16]

The case came on for hearing upon the motions to dismiss. [15-16, 42-43] Briefs were filed and considered. [43]

The court wrote an elaborate opinion holding that the motions to dismiss should be granted. [16-41] Pursuant to the opinion, an order dismissing the complaint was entered. [41-42]

Notice of appeal and bond were duly filed. [1-2, 43-44] The cause was duly briefed, argued and submitted, resulting in a judgment of affirmance on January 11, 1949.

FACTS

It was alleged that respondents were members of the local board and the board of appeal, except Compere and Lewis, who were members of the State Director's office of Arkansas. [IV, 4] [2]

It was alleged that, although respondents acted as members of the draft boards, they were sued individually. [V, 4]

[2] Roman numerals within brackets refer to paragraphs of the complaint. Arabic numerals *within parentheses* enclosed by brackets refer to sections of paragraphs of complaint.

Gibson alleged that he registered under the Act, filed a questionnaire and showed he was a duly ordained minister of religion, regularly and customarily teaching and preaching the doctrines and principles of Jehovah's witnesses, and was, therefore, exempt from all training and service. [VI (1), 4-5] He alleged that in his questionnaire he claimed classification in IV-D, which exempted him from all training and service under Section 5 (d) of the Act. [VI (2), 5] He alleged that the local board denied him this classification and put him in class I-A, which made him liable for training and service in the armed forces, and that he duly appealed to the appeal board which reversed the local board and placed him in class IV-E. This classification denied petitioner his exemption and made him liable for training and service in a civilian public service camp. [VI (3) (4), 5] Gibson further alleged that he attempted to have respondents Compere and Lewis appeal his case to the President and grant him his claim for exemption, which they refused. There followed, he alleged, an order for a physical examination, which he complied with, resulting in his being found acceptable for training and service. [VI (5), 5-6]

Petitioner Gibson alleged that, after being found physically fit for service, he was ordered to report to his local board on August 21, 1944, for work of national importance at a civilian public service camp located near Hill City, South Dakota. [VI (6), 6] He alleged that he went to the camp to exhaust his remedies, left on August 28, 1944, after acceptance, was thereafter arrested and charged with a violation of the Act by failure to remain at the camp, that is, he was charged with deserting and refusing to perform work of national importance as directed by the Selective Service System. [VI (6) (7) (8)-VII, (1), 6-7] He alleged that he was tried to a jury before the court on February 13, 1945, which resulted in his conviction, sentence and commitment to the custody of the Attorney General for a period of five years, which conviction was appealed and ultimately

reversed by this Court, followed by a dismissal of the indictment on February 4, 1947, completely exonerating him from liability. [VII (2), 7]

Petitioner alleged the details of his ministerial duties which he asserted entitled him to complete exemption from all training and service as a minister of religion under Section 5 (d) of the Act and Section 622.44 of the Regulations, and further alleged that such facts and exempt status were established in the draft board file by undisputed evidence. [VIII-IX, 8] He alleged that respondents disregarded the proof submitted to them showing that he was exempt as a minister; that they acted contrary to the Act and Regulations; that they ignored and disregarded advice from National Headquarters concerning his ministerial status; that respondents discriminated against him; and that respondents deprived him of a full and fair hearing. [X, 9-10]

Petitioner further alleged that there was no evidence in the draft board file showing he was not a minister of religion; that there was no evidence showing that he was an impostor-minister; that there was no evidence that he did not represent the Watchtower Bible and Tract Society and Jehovah's witnesses as claimed; that respondents had no authority to order him to report for service; that respondents had no discretion or authority to deny his claim for exemption as a minister of religion; that respondents acted arbitrarily and capriciously; that respondents grossly and clearly abused any discretion they may have had and illegally misused their powers; that respondents acted without warrant of law or fact; that respondents made their findings without basis in fact and contrary to the undisputed evidence; and that respondents violated petitioner's rights, liberty, privileges and immunities, contrary to the Civil Rights Act and the due process clause of the Fifth Amend-

ment. [XI-XIII, 10-12] Petitioner further alleged that respondents, acting jointly and severally, in bad faith, maliciously, without just cause, arbitrarily, capriciously, and in defiance af the Selective Training and Service Act and Regulations, denied his claim for exemption, caused his arrest, prosecution, conviction, and commitment to prison, which were without probable cause, resulting in injuries and damages to the extent of Ten Thousand Dollars. [XII-XV, 11-13]

How Issues Raised

The respondents filed their motions to dismiss in which they asserted that the complaint should be dismissed because of a failure to allege a cause of action. [15-16] The trial court sustained the motion to dismiss on the ground that the members of the Selective Service System were protected with absolute immunity against any claim for damages. [16-41]

These issues properly raised the questions presented upon appeal to the Court of Appeals and support the questions presented upon this petition for writ of certiorari.

Specifications of Error

The Court of Appeals for the Eighth Circuit erred—

(1) in holding that a cause of action for damages was not stated;

(2) in holding that the respondents were protected by absolute immunity against claim for damages; and

(3) in affirming the order of the trial court dismissing the complaint.

Reasons Relied on for Granting Writ

The decision of the court below is in direct conflict with *Wise* v. *Withers*, 3 Cranch (7 U.S.) 330 where it was held that one wrongfully classified as liable for training and service could obtain damages because the administrative agency exceeded its authority in confiscating the property of the person erroneously classified for training and service.

In event the Court does not find that there is conflict in these holdings, then petitioner says that there is an important question of administrative law presented upon this petition which has not been, but which should be, decided by this Court.

The greater weight of authority to be found in the state reports sustains the proposition that a member of an administrative agency is liable for malicious acts committed in excess of authority while acting under color of office. *Stiles* v. *Municipal Council of the City of Lowell*, 233 Mass. 174 (1919); *Coffin* v. *Field*, 7 Cush. 355; *Miller* v. *Horton*, 152 Mass. 540; *Larned* v. *Wheeler*, 140 Mass. 390; *Stetson* v. *Kempton*, 13 Mass. 272, 283; *Moynihan* v. *Todd*, 188 Mass. 301; *Pearson* v. *Zehr*, 138 Ill. 48, 51 (1891); *Lowe* v. *Conroy*, 120 Wis. 151 (1904); *Stevens* v. *Black*, 212 Mich. 281 (1920); *Rock* v. *Carney*, 216 Mich. 280.

Some of these decisions were cited with approval by this Court in *North American Storage Co.* v. *Chicago*, 211 U.S. 306. See 21 MINN. L. REV. 263.

A decision directly in point here is that of *Wise* v. *Withers*, 3 Cranch (7 U.S.) 330 (1806). In that case the action was for damages against an officer for entering and taking goods from the house of the plaintiff pursuant to an execution issued by and upon a judgment of a military tribunal. The defendant pleaded he was not liable because he was acting officially as a collector of militia fines and pleaded the finding of the tribunal that the plaintiff was liable to the conscription act and had been declared delinquent by

the tribunal and subject to the penalties of the act. The plaintiff claimed that he was exempt because a federal officer and alleged that he was a justice of the peace. The trial court dismissed his action for failure to allege a cause of action. This Court reversed the judgment of the trial court on the grounds that the officer was liable for damages resulting from the judgment of the tribunal made in excess of authority conferred by law. Mr. Chief Justice Marshall, for the Court, said:

"It follows, from this opinion, that a court martial has no jurisdiction over a justice of the peace, as a militia man; he could never be legally enrolled: and it is a principle, that a decision of such a tribunal, in a case clearly without its jurisdiction, cannot protect the officer who executes it. The court and the officer are all trespassers." 3 Cranch 330, 337.

The doctrine of *Wise* v. *Withers,* 3 Cranch (7 U.S.) 330, has never been overruled by the Court. It has been repeatedly approved, applied and extended in other later decisions of the Court. It was cited with approval in *Dynes* v. *Hoover,* 20 How. (61 U.S.) 65 (1857), where the Court said: " . . . And this upon the principle, that where a court has no jurisdiction over the subject-matter, it tries and assumes it; or where an inferior court has jurisdiction over the subject matter, but is bound to adopt certain rules in its proceedings, from which it deviates, whereby the proceedings are rendered coram non judice, that trespass for false imprisonment is the proper remedy, where the liberty of the citizen has been restrained by process of the court, or by the execution of the judgment. Such is the law in either case, in respect to the court, which acts without having jurisdiction over the subject matter; or which, having jurisdiction, disregards the rules of proceeding enjoined by the law for its exercise, so as to render the case coram non judice."

The doctrine that administrative officers are liable in

damages for their *ultra vires* acts as stated in *Wise* v. *Withers, supra,* was also followed in *Dow* v. *Johnson,* 100 U.S. 158, (1879); *Noble* v. *Union River Logging Railroad,* 147 U.S. 165 (1893); see also *McClaughry* v. *Deming,* 186 U.S. 49 (1902).

Additional authorities where administrative officials have been held liable for damages for wrongful acts committed under color of law and their offices are: *Amy* v. *The Supervisors,* 11 Wall. (78 U.S.) 136; *Boyden* v. *Burke,* 14 How. (55 U.S.) 575; *Asher* v. *Cabell,* 50 F. 818; *Lammon* v. *Feusier,* 111 U.S. 17; *West* v. *Cabell,* 153 U.S. 78; *Conklin* v. *Newton,* 35 F. 2d 541, aff'd 34 F. 2d 612. In *Wilkes* v. *Dimsman,* 7 How. (48 U.S.) 89, at page 130, the Court held that administrative officers are liable in damages for acts committed maliciously even though within the scope of their offices.

The court below recognizes that the rule of absolute personal immunity against liability for damages does not extend to all federal officials and mere administrative agencies of the Government. The court below, however, held that public policy required that the draft board officials be clothed with quasi-judicial duties entitling them to absolute immunity. It held that inasmuch as the members of the draft board were acting under color of their office they were absolutely free from any claim for damages so long as they acted free of ill will, malice and spite. The court below then made a scrutinous review of the complaint and held that, as a matter of law, the members of the draft board were not guilty of possessing malice or ill will. This conclusion reached by the court below flew in the teeth of the admitted allegations of the complaint which conclusively alleged that the members of the draft board were guilty of malice, prejudice, bias and caprice in determining petitioner's classification.

In other words the court below performed the functions that should have been performed and would have been per-

formed by the jury after all the evidence was in. Petitioner never had his day in court on this issue. It was unlawful for the court below to find the facts against the petitioner when he was not allowed an opportunity to offer evidence. Petitioner was entitled to a trial upon the merits in the district court—which he never got—on the issue of whether the respondents were possessed of malice against him in denying his claim for exemption from training and service.

Petitioner bases his position on the fact that respondents herein acted entirely outside the scope of their authority, and therefore that the question of scope of authority is the only one of importance here. Distinctions as to the nature of respondents' duties, whether or not they were in good faith, and whether or not they were acting under an innocent mistake of law are not relevant to the issue here raised. Thus the cases relied upon by respondents to sustain their contention which involve persons acting in a judicial or quasi-judicial capacity such as *Bradley* v. *Fisher,* 13 Wall. (80 U.S.) 335, *Yaselli* v. *Goff,* 12 F. 2d 396, *Williams* v. *Weaver,* 100 U.S. 547, and *Smith* v. *O'Brien,* 88 F. 2d 769, are clearly irrelevant since the making of decisions is obviously within the scope of the duties of a judicial official whether such decisions later develop to be right or wrong. Further the cases involving distinctions between ministerial and discretionary duties are equally irrelevant. Typical of such cases are *Kendall* v. *Stokes,* 3 How. (44 U.S.) 87, in which the Court discussed an act "in relation to which it is his duty to exercise judgment and discretion"; *Spalding* v. *Vilas,* 161 U.S. 483, in which officials were exempted from liability "when engaged in the discharge of duties imposed upon them by law" and in which the court said "we recognize a distinction between action taken by the head of a Department in reference to matters which are manifestly or palpably beyond his authority"; *Standard Nut Margarine Co. of Florida* v. *Mellon,* 72 F. 2d 557, in which the court found that the subject matter of the con-

tested assessment was within the official's "jurisdiction and authority"; *Cooper* v. *O'Connor,* 99 F. 2d 135, in which the court stated that the policy of the law is that a public official shall not be harassed by civil litigation "if the act complained of was done within the scope of the officer's duties as defined by law." All of the above quotations are excerpts from quotations cited frequently to support a proposition similar to respondent's. Each decision serves to disqualify the case relied upon by the respondents and to fortify petitioner's position that in a case such as this where the public officials clearly acted outside the scope of their authority they are unquestionably liable in damages. Compare *Land* v. *Dollar,* 330 U.S. 731.

The rule of absolute immunity, which enshrouds the judiciary, has not been extended by holding to protect administrative officers. The respondents argue that it has. While there may be some dictum, in the opinions, to the effect that a public federal officer is protected against liability for acts in excess of authority on the theory that immunity extends to protect him for every act done under color of office (*Laughlin* v. *Rosenman,* 163 F. 2d 838, 841-842 (App. D.C., 1947); *Cooper* v. *O'Connor,* 99 F. 2d 135, 105 F. 2d 761, 107 F. 2d 207), yet all the cases held that immunity applied because the acts complained of were committed within the scope of authority conferred by law upon the officers. See *Jones* v. *Kennedy,* 121 F. 2d 40, 42-43 (App. D.C., 1941); *Cooper* v. *O'Connor,* 107 F. 2d 207, 209 (App. D.C.); *Cooper* v. *O'Connor,* 105 F. 2d 761, 763 (App. D.C.).

The cases dealing with the question of the personal liability of public officials discuss at length the various distinctions between discretionary and ministerial duties,[3] between acts done in good faith and otherwise and between acts performed under innocent mistakes of fact or law.

[3] See 20 MICH. L. REV. 848, 854, 856-858.

They are uniform, however, in holding that if the act done was actually outside the scope of the official's authority he is liable whether or not he was acting in good faith, under mistake of law or fact, or in a ministerial or discretionary capacity. *Wise* v. *Withers,* 3 Cranch (7 U.S.) 331; *Kendall* v. *Stokes,* 3 How. (44 U.S.) 87; *Bradley* v. *Fisher,* 13 Wall. (80 U.S.) 335; *Spalding* v. *Vilas,* 161 U.S. 483; *Standard Nut Margarine Co.* v. *Melon,* 72 F. 2d 557, cert. denied 293 U.S. 605 (1934); *Cooper* v. *O'Connor,* 99 F. 2d 135 (1938), cert. denied 305 U.S. 643. See also Harper on Torts, par. 298, pp. 666 *et seq.*

Judge Hall, in *Wilcox* v. *Emmons,* 67 F. Supp. 339 (D.C. Calif., 1946), reversed on other grounds in 161 F. 2d 785, cert. denied 332 U.S. 763, said of *Cooper* v. *O'Connor, supra,* relied upon by respondents, "recognizes the general rule that the test of liability is whether or not one *exceeds* the authority granted by law, and bases its decision on the proposition that the acts of the defendants there involved were *within* their lawful authority, whereas, in the instant case, it is my conclusion that the defendant *exceeded* his lawful authority, *Cromwell* v. *McFadon* (1814), 8 Cr. 93; *Martin* v. *Mott* (1827), 12 Wheat. 19; *Luther* v. *Borden* (1849), 7 How. 1; *Spalding* v. *Vilas* (1896), 161 U.S. 483; and *Moyer* v. *Peabody* (1909), 212 U.S. 78, likewise all turn upon the proposition that the acts complained of were within the legal authority of the actors as does *Kendall* v. *Stokes* (1845), 3 How. 87."

If the respondents' theory, announced by the court below, of absolute immunity for all acts of administrative officers, regardless of excess of jurisdiction or usurpation of authority is true, then it would be impossible ever to maintain a malicious prosecution charge against any policeman or administrative official acting entirely without jurisdiction but under color of his office.

There is hardly a tort committed by an official in excess of authority that is not done in the color of his office. If

absolute immunity of the judiciary is to be extended to every public officer then there is an end to protection of the individual from the torts of officials. The driver of a mail truck in the employ of the Post Office Department acts under the color of his office and is acting officially when he drives the truck. The rule of absolute immunity would excuse him from liability for negligence in operation of the truck that caused damage to a citizen. The policeman who arrests a person without a warrant on a charge of a minor offense could never be sued for false imprisonment, irrespective of how greatly he exceeded and abused his authority, if the absolute immunity doctrine is to be extended as far as the appellees would like to stretch it. The instances of immunity for those who abuse authority and where formerly the law has held the officials answerable for their torts may be multiplied without end.

The denial of a full and fair hearing was unconstitutional. It must be deemed clearly outside the local board's authority because neither the Act nor the Regulations can authorize the board to do an unconstitutional act. As forcibly stated in the leading case of *Poindexter* v. *Greenhow,* 114 U.S. 270, where the defendant officer relied on statutory authorization:

"That [the statute on which defendant officer relied], it is true, is a legislative act of the Governor of Virginia, but it is not a law of the State of Virginia. The State has passed no such law, and it cannot; and what it cannot do, it certainly, in contemplation of law, has not done. The Constitution of the United States . . . (is) the law of Virginia; and that law . . . declared every step to enforce the tax . . . to be without warrant of law, and therefore a wrong. He stands, then, stripped of his official character; and confessing a personal violation of plaintiff's rights for which he must personally answer, he is without defense. . . . That which, therefore, is unlawful because made so by the Supreme law, the Constitution of the United States,

is not the word or deed of the State but is the mere wrong and trespass of those indvidual persons who falsely speak and act in its name." 114 U.S. at pp. 288-290.

Similarly, see *Hopkins* v. *Clemson Agricultural College*, 221 U.S. 636, where the Court stated:

"The many claims of immunity from suit have therefore been uniformly denied, where the action was brought for injuries done or threatened by public officers. If they were indeed agents, acting for the State, they—though not exempt from suit—could successfully defend by exhibiting the valid power of attorney or lawful authority under which they acted. *Cunningham* v. *Macon & Brunswick R. R.*, 109 U.S. 446, 452. But if it appeared that they proceeded under an unconstitutional statute their justification failed and their claim of immunity disappeared on the production of the void statute. . . . a void act is neither a law nor a command. It is a nullity. It confers no authority. It affords no protection. Whoever seeks to enforce unconstitutional statutes, or to justify under them or to obtain immunity through them, fails in his defense and in his claim of exemption from suit." (221 U.S. 643 and 644)

The rule is the same whether the statute as a whole is unconstitutional or as is more customarily the case, the court is only concerned with the constitutionality of the particular application of it with which the defendant is charged. See *Poindexter* v. *Greenhow, supra,* where the legislation was held unconstitutional in its application to plaintiffs (114 U.S. 270) and the defendant therefore liable to them in damages; see also *Nixon* v. *Herndon,* 273 U.S. 536; *Yearsley* v. *Ross Sonstruction Co.,* 309 U.S. 18; *Belknap* v. *Schild,* 161 U.S. 10, 18; *Kilbourn* v. *Thompson,* 103 U.S. 168.

The decisions relied upon by the court below have no effect against the position taken by the petitioner because his case is supported by the Civil Rights Act, invoked by him. The case here is therefore ruled by *Picking* v. *Pennsylvania Railroad Company,* 151 F. 2d 240 (C.A. 3d, 1945). The distinction of this decision made by the court below is a distinction without a difference. Public policy requires that federal officers be subject to equally the same restraint as are state officers. *Shelley* v. *Kraemer,* 334 U.S. 1. Therefore the rule of *Picking* v. *Pennsylvania Railroad Company,* 151 F. 2d 240 (C.A. 3d, 1945), applies.

The cloak of immunity from damages because of official action by respondents, agents of Selective Service System, slipped from their shoulders when they stepped out of the man-power barrel to grab and pull into it a minister of religion who was removed from the barrel and exempted by Congress because he was regularly and customarily preaching and teaching the doctrines and principles of a recognized religious organization. Their acts were in excess of authority and regardless of malice they are responsible in damages. *Wise* v. *Withers,* 3 *Cranch* (7 U.S.) 330. Their good faith is no defense for their illegal acts. *United States* v. *Zieber,* 161 F. 2d 90, 93 (C.A. 3d, 1947). The judicial immunity doctrine, properly extended to prosecutors, does not extend to acts of executive and administrative officers of the Government.

The absolute immunity of the sovereign extends to the Government itself and to the judiciary and to administrative officials acting within the scope of their authority. It stops and does not protect such executive officials acting without jurisdiction or in excess of authority although they may act under color of law or their office. A further extension by opinion of the courts cannot be made unless authorized by this Court. This Court has not so held. This Court should not innovate as requested by respondents.

But assuming that the doctrine of immunity extends even to protect acts committed by executive officers in excess of their authority a cause of action against respondents is nevertheless alleged showing they are liable because it is alleged that they acted maliciously, arbitrarily and capriciously when they exceeded their authority by denying petitioner his claim for exemption. Executive officers are liable for damage caused by malicious and capricious acts beyond their scope of authority.

A holding that respondents may be found liable under either one of the foregoing principles leads the Court to a consideration of whether, from the facts alleged in the complaint, it appears that the classification of petitioner was beyond the scope of respondents' authority conferred by the Act and Regulations. Facts are alleged which bring the case clearly within the case of *Hull* v. *Stalter,* 151 F. 2d 633 (C.A. 7th, 1945) and outside the scope of *Cox* v. *United States,* 332 U.S. 442 (1947), which shows that the action of respondents is beyond their jurisdiction so as to bring them within either one of the foregoing principles.

Conclusion

For the reasons stated, your petitioner prays that this Court exercise its discretion by directing the issuance of a writ of certiorari to the Court of Appeals for the Eighth Circuit, directing such court to certify to this Court for review and determination on a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the order of the Court of Appeals, affirming the judgment of the district court, be here set aside and held for naught; and that your petitioner

be granted such other and further relief in the premises as to this Court may seem just and proper in the circumstances.

TAZE HAMRICK GIBSON

Petitioner

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 737

TAZE HAMRICK GIBSON, PETITIONER

v.

A. P. REYNOLDS, E. H. MELLOR, B. R. MCCLANAHAN, S. C. VINSONHALER, JOE K. MAHONY, EBENEZER L. COMPERE AND TROY W. LEWIS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas (R. 16-41) is reported at 77 F. Supp. 629. The opinion of the United States Court of Appeals for the Eighth Circuit (R. 48-58) is reported at 172 F. 2d 95.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on January 11, 1949 (R. 58). The time for filing the petition for a writ of certiorari was extended by order of Mr. Justice Reed to April 25, 1949 (R. 63),

and the petition was filed on April 18, 1949. The jurisdiction of this Court is invoked under 28 U S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether respondents, irrespective of motives, may be required to respond in damages because of official acts, involving the exercise of judgment and discretion, necessarily performed by them in carrying out the purposes of the Selective Training and Service Act.

2. Whether the complaint filed by petitioner in the case at bar sets forth facts sufficient to allege a cause of action either for malicious prosecution or for violation of the Civil Rights statutes of the United States.

3. Whether this suit is barred by the applicable Arkansas statute of limitations with respect to the alleged violation of the Civil Rights Statutes.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act and the regulations issued thereunder are set forth in the Appendix, *infra,* pp. 15-19.

STATEMENT

On January 29, 1948, petitioner filed a complaint in the United States District Court for the Western District of Arkansas against respondents, claiming damages in the amount of $10,000 on the ground that their refusal to exempt him from training and service as a minister of religion under Section 5(d) of the Selective Training and Service Act, 54 Stat. 888, 50 U. S. C. App. 305(d), *infra* p.

15, had caused him to be arrested, maliciously prosecuted, and convicted without probable cause, and to be illegally imprisoned pending the time his conviction was reversed by this Court.[1] The complaint further stated that the action of the respondents in denying him classification as a minister of religion was contrary to the Fifth Amendment and in violation of the Civil Rights Statute. (R. 3-13.)

The material allegations in the complaint are briefly as follows: On June 30, 1942, petitioner registered under the Selective Training and Service Act with Local Board "A", El Dorado, Arkansas (R. 4). On October 12, 1942, he filed a Selective Service questionnaire asserting that he was a minister of religion of Jehovah's Witnesses and claiming that he was entitled to be placed in Class IV-D and to be exempted from training and service under Section 5(d) of the Selective Training and Service Act (R. 4-5). On November 6, 1942, Local Draft Board "A", El Dorado, Arkansas, classified peti-

[1] The complaint states that petitioner is a citizen of the State of Indiana, and further shows that at the times mentioned therein, respondents Reynolds, Mellor, and McClanahan were chairman and members, respectively, of Selective Service Local Draft Board "A", El Dorado, Arkansas, that respondents Vinsonhaler and Mahony were chairman and member of Selective Appeal Board No. 2, Little Rock and El Dorado, Arkansas, respectively, that respondent Compere was Selective Service State Director, El Dorado, Arkansas, and that respondent Lewis was chief of the legal division and assistant to the Selective Service State Director, Little Rock, Arkansas. (R. 4).

tioner as I-A, *i.e.*, liable for training and service in the armed forces (R. 5). On May 8, 1943, Appeal Board No. 2 reversed the classification made by Local Board "A" and placed petitioner in Class IV-E, which made him liable for service in a civilian public service camp as a conscientious objector, thereby denying him exemption from training and service as a minister of religion (R. 5).

Thereafter, petitioner requested respondent Compere, State Director of Selective Service for Arkansas, to appeal the determination to the President of the United States, and to stay the induction process, but respondents Compere and Lewis refused to take such action, and on May 23, 1944, petitioner was assigned to work in a civilian public service camp (R. 5-6). On August 21, 1944, pursuant to order, plaintiff appeared at the local board in Carlinville, Illinois, and was sent to the public service camp at Hill City, South Dakota, where he remained until August 28, 1944, when he was found to be physically acceptable (R. 6). He did not report to do work of national importance, as indicated in the order mailed him, but appeared merely to complete the administrative process (R. 6). At his request, the Director of the camp gave him a statement showing that he had reported there on August 23, 1944, that the administrative process had been completed, and that without performing any work the plaintiff had voluntarily left the camp. (R. 6, 7).

On or about December 2, 1944, plaintiff was arrested on a charge of violating Section 11 of the Selective Training and Service Act (50 U. S. C. App. 311), under an indictment returned in the United States District Court for the District of South Dakota. The indictment charged that plaintiff, on August 23, 1944, reported at the camp in South Dakota, was enrolled there for work of national importance, but left on August 28, 1944, with the intention of staying away. (R. 7.)

On or about February 13, 1945, following trial, he was convicted and sentenced to five years imprisonment and committed to the custody of the Attorney General. On appeal the conviction was affirmed. *Gibson* v. *United States,* 149 F. 2d 751 (C. A. 8). On December 23, 1946, this Court on writ of certiorari reversed the conviction and remanded the case for a new trial on the ground that petitioner should have been permitted to interpose in the criminal proceeding the defense that the Selective Service classification assigned to him was erroneous. *Gibson* v. *United States,* 329 U. S. 338. (R. 7, 8.) On February 4, 1947, the indictment was dismissed, and plaintiff was discharged (R. 8).

The respondents moved separately to dismiss the action on the grounds (1) that the complaint failed to state a claim against them on which relief could be granted, and (2) that if the claim should be otherwise stated, the complaint showed on its face that the alleged claim was barred by the statute of

limitations (R. 13-14). The district court held that respondents were within the rule of immunity which exempts public officers from civil liability for acts performed by them within the scope of their authority (R. 16-41), and dismissed the complaint (R. 41-42). On appeal, the court below affirmed the decision of the district court, holding that respondents were immune from this suit because the complaint failed to state facts from which it could be inferred that the acts of respondents "were not committed in the discharge of their official duties or were not within the scope of their authority," or that they were committed for the purpose of maliciously injuring petitioner (R. 48-58).

ARGUMENT

1. The conclusion reached by both the district court and the court below that the complaint failed to state a cause of action against respondents is clearly correct.[2] The rule that administrative and quasi-judicial officers are immune from civil liability for acts, involving the exercise of judgment and discretion, performed by them while proceeding within the scope of their authority has long been recognized and has been applied to many dif-

[2] The United States District Court for the Northern District of Ohio, and the United States Court of Appeals for the Fifth Circuit followed the decision of the court below in the case of *Dodez* v. *Weygandt*, et al., No. 10775, decided May 2, 1949, which was a similar proceeding. *Dodez* v. *United States*, No. 86, O.T. 1948, was a companion case to *Gibson* v. *United States*, 329 U.S. 338.

ferent federal officers. *Spalding* v. *Vilas,* 161 U. S. 483; *Mellon* v. *Brewer,* 18 F. 2d 168 (C. A. D. C.), certiorari denied, 275 U. S. 530; *Brown* v. *Rudolph,* 25 F. 2d 540 (C. A. D. C.), certiorari denied, 277 U. S. 605; *Standard Nut Margarine Company* v. *Mellon,* 72 F. 2d 557 (C. A. D. C.), certiorari denied, 293 U. S. 605; *Jones* v. *Kennedy,* 121 F. 2d 40 (C. A. D. C.), certiorari denied, 314 U. S. 665; *Cooper* v. *O'Connor,* 99 F. 2d 135 (C. A. D. C.), certiorari denied, 305 U. S. 643; *Lang* v. *Wood,* 92 F. 2d 211 (C. A. D. C.), certiorari denied, 302 U. S. 686; *Adams* v. *Home Owners' Loan Corp.,* 107 F. 2d 139 (C. A. 8); *Phelps* v. *Dawson,* 97 F. 2d 339 (C. A. 8).[3]

The basis for the immunity rule is said to be that the public interests require that officers, when acting within the scope of their authority, should be under no apprehension that the motives that control their official conduct may at any time subject them to a civil action for damages. (*Spalding* v. *Vilas, supra,* at p. 498); otherwise that perfect freedom which ought to exist in discharge of public duty might be seriously restrained. *Cooper* v.

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[3] These cases include the Postmaster General, the Secretary and Assistant Secretary of the Treasury, members of the Securities and Exchange Commission, the Comptroller of the Currency, members of the Parole Board, the warden of a penitentiary, the Director of Prisons, officials of the Home Owners Loan Corporation, the Commissioners of the District of Columbia, a building inspector, the Commissioner of Indian Affairs, the Chief of Record of Pension, War Department, and a deputy fire marshal, and numerous others.

O'Connor, supra, at p. 142. The considerations of public policy stated by the courts to underlie the immunity rule are conspicuous in offices such as those held by respondents. As the court below observed, members of the local Draft Boards, the Boards of Appeal, and the State Directors and their legal advisors must fairly, fearlessly, freely, and conscientiously determine the destinies of a huge sector of the American people, and there could hardly be any group of public officers whose independence of action is more essential, and whose freedom from threats, duress, and compulsion of any kind is more necessary (R. 53).

Respondents were clearly acting within the scope of their authority when they performed the acts involved here. Petitioner was required by law to register and have his status decided by the Selective Service officers. *United States ex rel. Goodman* v. *Hearn,* 153 F. 2d 186, 187 (C. A. 5); *Harris* v. *Ross,* 146 F. 2d 355, 357 (C. A. 5). The fact that he claimed exemption as a minister of religion did not excuse him from the duty of registering. Respondents Reynolds, Mellor and McClanahan of the Local Board were required to assign a classification to all registrants, including petitioner. In assigning a classification to petitioner, they were required to pass upon the question of petitioner's claimed exemption and in so doing they acted within the scope of their authority under Section 10(a)(2), of the Selective Training and Service Act, *infra,* pp. 15-16, 32 C. F. R. 601.128 and

603.326 (1940 Supp.), *infra,* pp. 17-18. Respondents Vinsonhaler and Mahony of the Board of Appeals, in passing upon petitioner's appeal from the Local Board's classification, likewise acted within the scope of their authority under Section 10(a)(2) of the Selective Training and Service Act, *infra,* pp. 15-16. The respondent, State Director of Selective Service, Compere, and his assistant (respondent Lewis), in passing upon petitioner's request that he be permitted to appeal his classification to the President, acted within the scope of their authority under Section 10(b) of the Selective Training and Service Act, *infra,* pp. 15-16, 32 C. F. R. 603.379, 603.380 (1940 Supp.), *infra,* pp. 18-19. Thus, all of the respondents were required by law to act upon the matters submitted to them by petitioner and any alleged error that was made in performing those duties did not place their acts beyond the scope of their authority for the purposes of immunity. *Bradley* v. *Fisher,* 13 Wall. 335, 351-354.

Wise v. *Withers,* 3 Cranch 330, relied on by petitioner (Pet. 9), is not in point. The militia officer there involved had no duty to make quasi-judicial determinations but rather was held to be a trespasser when he undertook to execute a void order. The other federal cases upon which petitioner relies (Pet. 10-11), are likewise not in point.

Petitioner's general and conclusory allegations that respondents acted arbitrarily, capriciously and maliciously in the absence of adequate allega-

tions of fact to support them are of no avail. Furthermore, respondents acted within the scope of their authority and they are immune from liability for their acts regardless of what their motives may have been. *Yaselli* v. *Goff*, 12 F. 2d 396 (C. A. 2), affirmed, 275 U. S. 503; *Standard Nut Margarine Co.* v. *Mellon*, 72 F. 2d 557, 559 (C. A. D. C.); *Cooper* v. *O'Connor, supra; Adams* v. *Home Owners' Loan Corporation et al., supra; Bradley* v. *Fisher*, 13 Wall. 335, 348.

We submit that the acts of respondents involved matters of judgment and discretion within the scope of their authority, and that they are immune from civil liability for the acts complained of by petitioner.

2. Petitioner contends that the action of respondents in refusing to exempt him as a minister of religion was malicious and that such action by them in Arkansas caused him to be maliciously prosecuted. Petitioner deliberately deserted the civilian public service camp in South Dakota and thus subjected himself to a charge of violating Section 11 of the Act. He was, therefore, prosecuted in South Dakota. Cf. *United States* v. *Anderson*, 328 U. S. 699. Consequently, petitioner's claim for malicious prosecution must be determined under the law of South Dakota. Leflar on *Arkansas Conflict of Laws*, Sec. 78, p. 187. Cf. *Missouri Pacific R.R. Co.* v. *Diffee*, 212 Ark. 55.

The Supreme Court of South Dakota has defined the necessary elements of "malicious prosecution"

in *Stauffacher* v. *Brother,* 67 So. Dak. 314, 317, 318, 292 N. W. 432 (1940), as follows:

> The elements of malicious prosecution are:
>
> "(1) the commencement or continuance of an original criminal or civil judicial proceeding; (2) its legal causation by the present defendant against plaintiff, who was defendant in the original proceeding; (3) its bona fide termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; (6) damage conforming to legal standards resulting to plaintiff." *Just* v. *Martin Bros. Co.,* 37 S. D. 470, 476, 159 N. W. 44, 46; *Larsen* v. *Johnson,* 47 S. D. 202, 204, 197 N. W. 230; 38 C.J. 386; *Chapman* v. *Anderson,* 55 App. D. C. 165, 3 F (2d) 336; *Wheeler* v. *Nesbitt et al.,* 24 How. 544, 65 U. S. 544, 16 L. Ed. 765; *Brown* v. *Keyes,* 54 S. D. 596, 223 N. W. 819.[4]

Here, petitioner has failed to allege the essential elements of "malicious prosecution," as above set forth. He has failed to allege that these respondents had anything to do with the "causation" of or

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[4] While the foregoing case does not define "legal causation" it cites with approval *Chapman* v. *Anderson,* 55 App. D. C. 165, 3 F. 2d 336, 339 (1925) wherein the court states:

> To support an action for a malicious criminal prosecution, the plaintiff must prove the fact of prosecution, and that the defendant was himself the prosecutor, or that he instigated its commencement * * *. He must also prove that the charge preferred against him was unfounded, and that it was made without reasonable or probable cause, and that the defendant in making or instigating it was actuated by malice, * * *.

that they instigated the criminal prosecution of which he complains, or, in fact, that said respondents even knew of the institution of such prosecution. He has also failed to allege, except by conclusion of law, that there was no probable cause for his prosecution. On the contrary, in par. VI of the complaint (R. 7) petitioner stated that he voluntarily left the civilian public service camp into which he had been inducted, which in itself was all the probable cause needed, if indeed it was not a deliberate invitation, for his indictment, arrest and trial (R. 6-7). Furthermore, petitioner has failed to show any malice on the part of the respondents in the South Dakota prosecution. Therefore, petitioner has not shown the necessary elements to justify recovery for malicious prosecution even if respondents were not immune from civil liability.

3. In his complaint, petitioner, as stated by the district court (R. 39), apparently attempted to state a claim under the Civil Rights Statutes by combining R. S. 1979 and 1980, 8 U. S. C. 43, 47.[5] The conduct of respondents here in no way involves action "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" as contemplated by R. S. 1979, *infra*, p. 16; nor does it involve any individual or State action for which R. S. 1980, *infra*, p. 16, was intended to

[5] Petitioner sets forth these sections in the petition (Pet. 2-3), but does not discuss or elaborate the point.

provide redress. *Love* v. *Chandler, et al.*, 124 F. 2d 785, 786 (C. A. 8).[6]

In any event, it is plain that petitioner's alleged claim under those sections is barred by limitations. The last event that took place as a direct result of the alleged acts was petitioner's entry into the civilian public service camp at Hill City, South Dakota, on August 23, 1944, and his remaining there until August 28, 1944, when he deliberately left (R. 7). The acts of respondents, of which petitioner herein complains, happened prior to, and all possible direct results therefrom terminated on, August 28, 1944, *more than three years* before the commencement of this action on January 29, 1948 (R. 3). Whatever happened to petitioner thereafter was the result of his own deliberate determination to desert the camp and suffer whatever might be the consequences, which action was voluntary and deliberate on his part and with which the respondents had nothing whatever to do. Therefore, he is barred by the Arkansas Statute of Limitations (See *O'Sullivan* v. *Felix*, 233 U. S. 318, 322), whether the claim be considered as one in the nature of direct trespass [one-year limitation; II Pope's Digest of Statutes of Arkansas (1937), Section 8929; 37 Arkansas Statutes 1947, Section

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[6] Cf. also *Mitchell* v. *Greenough, et al.*, 100 F. 2d 184 (C. A. 9), certiorari denied, 306 U.S. 659; *Laughlin* v. *Rosenman*, 163 F. 2d 838 (C. A. D. C.); *Picking* v. *Pennsylvania R. Co.*, 151 F. 2d 240 (C. A. 3), relied upon by petitioner involved action by state officials acting purportedly under state statutes.

201] or one in the nature of trespass on the case [three-year limitation, II Pope's Digest of Statutes of Arkansas (1937), Section 8928; 37 Arkansas Statutes 1947 206].

CONCLUSION

The decision of the court below is clearly correct. There is no conflict of decision, and the case does not warrant further review. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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May 1949.

APPENDIX

1. The pertinent parts of the Selective Training and Service Act, 54 Stat. 885, 888, 893, as amended by the Act of December 5, 1943, 57 Stat. 596, 50 U. S. C. App. 305(d), 310(a), (b) read as follows:

> Sec. 5(d). Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.
>
> Sec. 10(a)(2). * * * Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. * * * Appeal boards within the Selective Service System shall be composed of civilians who are citizens of the United States. The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5 (l) of this Act.
>
> Sec. 10(b). The President is authorized to delegate to the Director of Selective Service only, any authority vested in him under this Act (except section 9). The Director of Selective Service may delegate and provide for the delegation of any authority so delegated to him by the President and any other authority vested in him under this Act, to such officers,

agents, or persons as he may designate or appoint for such purpose or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe.

2. The pertinent provisions of the Revised Statutes of the United States, 8 U. S. C. 43, 47, read as follows:

Sec. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Sec. 1980. * * *

* * * * *

Third. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice-President, or as

a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

3. The pertinent parts of the Selective Service Regulations, 32 C. F. R. (1940 Supp.) read as follows:

§ 601.128. *Jurisdiction.* The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed, and to all persons whose registration cards are duly transferred to it. It shall have full authority to do and perform all acts authorized by the selective service law. * * *

§ 601.140. *Jurisdiction.* Each board of appeal shall have jurisdiction to review any decision concerning the classification of a registrant by any local board in the area of the board of appeal, and to affirm, modify, or reverse the decision, provided that an appeal has been filed with the local board. * * *

§ 603.326. *Responsibility of local board.* (a) * * * It is the local board's responsibility to decide in the first instance in which class each registrant should be placed. This should be accomplished so as to give equal and fair justice to all. The entire administration of the selective service law shall be impartial and

free from any political influences. There shall be no discrimination for or against any person because of his race, creed, or color, or because of his membership or activity in any labor, political, religious, or other organization.

(b) Classification is the key to selection, and it must be accomplished in the spirit of the Selective Service Act, in the preamble of which Congress has declared "That in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system. * * * "

§ 603.379. *Conditions for appeal to the President.* An appeal from a determination of a board of appeal may be made to the President, only if all the following conditions are satisfied:

(a) A board of appeal must have placed the registrant in Class I or Class IV-E, and at least one or more members of the board of appeal must have dissented from a determination of that board that the registrant should not be deferred because of dependency.

(b) The appeal to the President must be on grounds of dependency only.

(c) The appeal (on the last page of the questionnaire) must be signed by the registrant, a dependent of the registrant, or the government appeal agent.

(d) The appeal must be made within 5 days of the mailing of the notice of classification or notice of continuance of classifications (§ 603.377), unless the local board grants an extension of time.

(e) A member of the local board, the government appeal agent, or the Governor must explain and certify, in writing, that great and unusual hardship will follow the induction of

the registrant, and the person so certifying must specifically recommend deferment.

§ 603.380. *Procedure of local board when appeal to the President is made.* When an appeal to the President is made, the local board shall:

(a) Enter on the Classification Record the date the appeal is forwarded.

(b) Forward to the Director of Selective Service for transmittal to the President all papers, including a summary of any oral testimony pertaining to the registrant except the registration card and the duplicate report of physical examination (Form 200).

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